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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

LINCOLN LOG HOMES, INC.,
Petitioner,

vs.

STANLEY ZONA and DEANNA ZONA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Should a party that fails to prosecute a claim be able to avoid a *sua sponte* dismissal of the action even though it has notice that the action may be dismissed?

B. Does the Appellate Court's decision to permit a party to reinstate the complaint circumvent the lower court's authority to enforce deadlines and impose sanctions when violations occur?

C. When a party fails to file a timely appeal, may a court nevertheless grant relief from the judgment upon the filing of a 60(B) motion?

STATEMENT PURSUANT TO RULE 29.1

Petitioner Lincoln Log Homes, Inc. is a publicly held corporation with no affiliates, subsidiaries or parent corporations. The stock of Lincoln Log Homes, Inc. is traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lincoln Log Homes, Inc., respectfully requests that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered June 5, 1992, reversing the decision in the captioned matter by the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

On June 5, 1992, a panel for the Court of Appeals for the Sixth Circuit *per curiam*, reversed the district court's decision rendered in favor of Lincoln Log Homes, Inc., and remanded the case for further proceedings. The opinion of the Court of Appeals is unreported, but reproduced in the Appendix of this Petition at page A1.

The February 18, 1991, Order of Dismissal of the trial court, the United States District Court for the Northern District of Ohio, Eastern Division, is also unreported, but reproduced on page A6 of the Appendix. The prior Court of Appeals decision of January 8, 1991, remanding the case to the district court for further consideration is reproduced at page A10.

Respondent's Motion to Reinstate the Complaint was overruled on February 20, 1990, the notation of which is included at page A15. That Motion followed the district court's original Order of Dismissal issued on March 30, 1989, and reproduced at Appendix page A16.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) (1988), and this Petition is timely pursuant to Sup. Ct. R. 13.1.

FEDERAL RULE INVOLVED

Rule 60. Relief from Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a Defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querala,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

On February 9, 1987, Respondents, by and through their counsel, sent a letter to Petitioner alleging various construction and installation defects in relation to a home bought from Petitioner and requesting that Petitioner submit this letter to its insurance company or attorney. Then, almost one year later, the Respondents filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, on January 12, 1988.

The Complaint made various allegations that Petitioner breached its contract with Respondents by sending negligently pre-assembled and inferior quality building materials for constructing a log home. Respondents made these allegations despite the fact that they bought the home from an independent dealer of these log homes and had no prior contractual relationship with Petitioner. Petitioner timely served its answer on January 28, 1988, asserting its position.

At the outset of the case, a Civil Case Standing Order regarding Preparation for Trial was issued to counsel for Respondents and Petitioner. In pertinent part, the Standing Order stated that the Order applied to all Civil Cases assigned to Judge Alvin Krenzler on or after the first day of August, 1987. In paragraph 1, page 1, Section II(G), the Order provided that:

> if counsel for any of the parties to the litigation does not comply with all of the requirements of this Standing Order or refuses to cooperate with opposing counsel, he or she may be subject to sanctions. Sanctions may be sought by motion of an imposing party or the Court may impose sanctions by its own Order.

Further, Section IV(L) provided in pertinent part that "failure of counsel to appear at any scheduled pretrial or otherwise comply with any of the provisions of this Standing Order may result in dismissal, default judgment, or the imposition of sanctions, as may be appropriate." That Standing Order also provided both parties with the pretrial statement format so that the parties were thoroughly familiar with the nature of the pretrial statement from the outset of the filing of the case. The Order very specifically and clearly set out a uniform and orderly procedure for preparing the case for trial. It also clearly stated that it was designed to promote "efficient and effective preparation of this case for settlement or trial."

With this Order outstanding, the District Court set an initial pretrial for February 25, 1988, to which all parties attended. There were times during the pendency of the action that Petitioner's counsel appeared by telephone device. However, appearance in this matter was always preceded by the Court's permission to do so. The Court also set a discovery cut-off date of April 29, 1988, with dispositive motions to be filed by May 13, 1988. On May 9, 1988, the Court extended this discovery cut-off date upon a Joint Motion for Extension of Discovery Date. The Court's Order Resetting the Date for Discovery Cut-Off and Setting Date for Submission of Attorney's Pretrial Statement extended the cut-off date in the following manner and with the following emphasis:

> The *discovery cut-off date* shall be *June 10, 1988*. The parties must complete all discovery on or before that date. The parties shall submit an *attorney's pretrial statement* on or before *July 29, 1988*.

During this extended period of discovery, Petitioner properly filed a Second Request for Production of Documents and a First Set of Interrogatories on May 13, 1988. These documents contained nine (9) interrogatories with various subparts and sixteen (16) requests for production of documents. Despite several letters and requests that Respondents' counsel promptly answer these discovery requests, Respondents did not answer these interrogatories for over five months. This lack of action by Respondents forced Petitioner to file a Motion for Discovery Sanctions in October of 1988. The Motion for Sanctions was denied by the Court, but the replies by Respondents were extremely untimely and were incomplete when finally served on Petitioner.

Pursuant to the Court's Standing Order and the Order Resetting the Discovery Cut-Off Date, Respondents and Petitioner would file a Joint Pretrial Statement on July 29, 1988. Based on the above discovery replies by Respondents, Petitioner agreed with Respondents that the parties required more time for discovery, and therefore, agreed to a Joint Motion for Extension of Time. However, concerned with the time constraints, Petitioner individually prepared a Pretrial Statement, stating that more time for discovery was needed, and sent said Pretrial Statement to the Court on July 29, 1988. Petitioner's Pretrial Statement was filed on August 1, 1988, and the Court overruled the Joint Motion for Extension of Time on August 9, 1988. Respondents never filed a Pretrial Statement.

Over six (6) months after the date that the Pretrial Statements were due, on January 26, 1989, the District Court specifically ordered Respondents to submit their Pretrial Statement on or before February 28, 1989. Respondents again failed to submit a Pretrial Statement. With Respondents having missed the Pretrial Statement deadlines of July 29, 1988, and February 28, 1989, the

District Court dismissed this case with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure on March 30, 1989.

On April 17, 1989, eighteen (18) days after the Order of Dismissal was filed, the Respondents filed a Motion to Reinstate the Complaint and later filed a Supplemental Motion to Reinstate the Complaint. However, the Respondents failed to appeal the Order of Dismissal filed on March 10, 1989. On February 20, 1990, the District Court overruled Respondents' Motions to Reinstate the Complaint. Finally, on March 22, 1990, the Respondents filed a Notice of Appeal.

Upon consideration of the authorities decided and discussed in the appellate proceedings, the Court of Appeals mandated on or about January 30, 1991, for the District Court to further consider whether or not a penalty and/or sanctions should be mandated rather than the case dismissed with prejudice. Upon due consideration of the facts, and the authorities cited and discussed, the District Court properly dismissed this case, with prejudice, for failure to prosecute, pursuant to Rule 41 of the Federal Rules of Civil Procedure and as a sanction upon Respondents.

The Respondents then filed their Notice of Appeal on March 19, 1991. Pursuant to the schedule of the United States Court of Appeals, Sixth Circuit Clerk, the Respondents' Brief was scheduled to be filed by June 13, 1991. However, Respondents were unable to meet this date of filing and filed a Motion for Leave to File Brief Instanter on July 1, 1991. Petitioner's brief was timely filed on July 26, 1991. Respondent's Brief was finally filed. The Appellate Court, on June 5, 1992, issued its decision erroneously reversing the District Court on the grounds that Respondents had not been notified of the possibility that they faced a *sua sponte* dismissal of their action.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S CONCLUSION THAT THE RESPONDENTS WERE NOT PUT ON NOTICE AS TO THE POSSIBILITY OF A *SUA SPONTE* DISMISSAL FOR FAILURE TO PROSECUTE IS INCONSISTENT WITH THE UNDISPUTED FACTS OF THIS CASE AND IS CONTRARY TO THE DECISIONS OF THIS COURT.

Judicial discretion is the "responsible exercise of official conscience on all the facts of a particular situation" considering the purpose of the power exercised. *Wright v. Sargent*, 869 F.2d 1175, 1176 (8th Cir. 1989) (citing *Welsh v. Automatic Poultry Feeder Co.*, 439 F.2d 95, 97 [8th Cir. 1971]) (quoting *Bowles v. Goebel*, 151 F.2d 671, 674 [8th Cir. 1945]). Based on all of the facts of this particular situation, the District Court properly used its discretion and its inherent power of dismissal under Federal Rules of Civil Procedure 41(b).

The District Court does have the power under Rule 41(b) to enter *sua sponte* an order of dismissal for lack of prosecution. The authority of the District Court to dismiss *sua sponte* for lack of prosecution is an inherent power governed not by rule or statute but by the necessity of each Court to manage its own affairs to achieve the orderly and expeditious disposition of cases. It is a power that cannot be seriously doubted. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 734 (1962). It is a power that the District Court considered carefully and based upon the facts of this particular case, decided that it was a power that needed to be invoked. It is a power that should be invoked when there is a showing of "a clear record of delay or contumacious conduct by the Plaintiff." *Pickel v. United States*, 746 F.2d 176, 182, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (3rd Cir. 1958).

The clear record of delay or contumacious conduct displayed by Respondents in regard to the District Court's Standing Order and various Court Orders justifiably invoked that District Court's power to dismiss this case. The District Court's Order of Dismissal (February 18, 1991) demonstrates this conduct by the Respondents. Respondents instituted the case in January of 1988. The District Court set a date for submission of pretrial statements for six months later on July 29, 1988. Respondents failed to file a pretrial statement. Almost one year after filing their complaint, Respondents still had not filed their pretrial statement, and so, the District Court ordered Respondents to submit their pretrial statement on or before February 28, 1989. The Respondents "ignored this order." *See*, Order of Dismissal, February 18, 1991, Appendix page A6. On March 30, 1989, Respondents still failed to submit a pretrial statement, and the District Court dismissed the case pursuant to Rule 41.

After this dismissal, the Respondents filed a Motion to Reinstate Complaint rather than a Notice of Appeal from the Order of Dismissal. Respondents further filed a Supplemental Motion to Reinstate Complaint but still failed to file their pretrial statement. Their Notice of Appeal from Order of Dismissal was not filed until almost one year after the Order, and the Respondents still failed to have their pretrial statement filed as of February 7, 1991, almost three years after institution of this case.

Despite this clear record of delay and contumacious conduct, the Appellate Court reversed the District Court's decision to dismiss the case pursuant to Rule 41. Respondents rely on *Vinci v. Consolidated Rail Corporation*, 927 F.2d 287 (6th Cir. 1991). However, the

instant case is very different from *Vinci*. *Vinci* involved the transfer of a case file from New York to Ohio, confusion as to whether a pretrial statement was due in this particular case, and a case that was less than one year old. In the instant case, the Respondents were very aware that a pretrial statement needed to be filed with the District Court. The District Court gave them the date of July 29, 1988, and then specifically set another deadline date for Respondents of February 28, 1989. The Respondents were on notice of their need to file a pretrial statement with the District Court.

The Respondents were also on notice pursuant to Section II (G) and Section IV(L) of the Standing Order that failure to comply with provisions of the Standing Order could result in dismissal, default judgment, or the imposition of sanctions as appropriate. Notice was given to Respondents through the Standing Order. *See, Link v. Wabash Railroad Co.*, 370 U.S. at 632. Further, Respondents voluntarily chose their counsel to represent them in this action, and they were certainly aware that their case had been pending in the District Court for almost two years. Respondents cannot now avoid the consequences of the omissions of their counsel. Each party is deemed to be bound by the acts of his or her counsel. Each party is considered to "have notice of all facts, notice of which can be charged upon the attorney." *Id.* at 634 (quoting *Smith v. Ayer*, 101 U.S. 320, 326). The combination of both the Standing Order and the two specific filing deadlines clearly provided Respondents with notice that they faced a possible dismissal for failing to file a pretrial statement.

II. BY GRANTING RESPONDENTS' MOTION TO REINSTATE THE COMPLAINT, THE APPELLATE COURT DIRECTLY INTERFERED WITH BOTH THE DISTRICT COURT'S AUTHORITY TO SEE THAT DEADLINES ARE ENFORCED AND THE DISCRETION TO IMPOSE SANCTIONS WHEN THOSE DEADLINES ARE NOT FOLLOWED.

This District Court has certain fundamental concepts that it must follow:

1. the trial judge with an individual calendar is charged with the duty of moving his cases expeditiously;

2. to do so, he must have the power to order time limitations and see that the deadlines contained in the Federal Rules of Civil Procedure are enforced;

3. he must have wide discretion to impose sanctions, without which he is helpless to enforce the exercise of his power under (2).

Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman, 80 F.R.D. 433, 435 (E.D. PA 1978). The Court must have the opportunity to orderly and expeditiously move its cases to final disposition. The case at bar is a case which was instituted in January of 1988, almost four and one-half years ago.

The Standing Order of the District Court very specifically and clearly set out a uniform and orderly procedure for preparing this case for trial. That Standing Order also clearly stated that it was designed to promote "efficient and effective preparation of this case for settlement or trial." In *Link*, the United States Supreme

Court affirmed the authority of a Court to dismiss *sua sponte* for lack of prosecution as an inherent power of the Court. The District Court's Order looked to the facts of this case and demonstrated that a clear record of delay and contumacious conduct existed in this case. *See, Link* at 634.

A clear record of contumacious conduct existed in this case in that the Respondents were in "gross and utter disregard" of not only the Standing Order of the District Court but also of various other Orders of the District Court. *See,* Order of Dismissal, February 18, 1991, Appendix page A6. The District Court's Order of Dismissal was not a "mechanical" dismissal. *See, Vinci,* 927 F.2d at 288.

Since that Order, Respondents' pattern of conduct continued into the Court of Appeals. Respondents filed for one continuance and then later filed a Motion for Leave to File Brief Instanter because the Respondents were unable to timely file their Brief with the Appellate Court.

Therefore, the Court of Appeals wrongfully reversed the District Court's decision to dismiss the action, with prejudice. The District Court did not abuse its discretion when it dismissed the Respondents' action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to file a timely pretrial statement. Nor did the District Court err in overruling Respondents' Motion for Reinstatement.

III. THE APPELLATE COURT ERRED IN REVERSING THE DECISION OF THE DISTRICT COURT FOR THE REASON THAT THE RESPONDENTS FAILED TO TIMELY APPEAL THE ORIGINAL ORDER OF DISMISSAL. THIS COURT'S CLARIFICATION IS NECESSARY TO PREVENT LOWER COURTS FROM PERMITTING THE USE OF A RULE 60(B) MOTION IN LIEU OF A TIMELY APPEAL.

The original Order of Dismissal in this action was filed on March 30, 1989. The Respondents did not appeal that Order. Instead, they filed a Motion to Re-Instate Complaint seventeen (17) days later, on April 17, 1989. On February 22, 1990, the trial court overruled this Motion. Respondents did not file an appeal until March 22, 1990, almost one year from the date of the Order of Dismissal.

On the first appeal, the Court of Appeals addressed the question regarding timeliness of the Respondents' appeal. In its decision, the Court stated at page 3, "we therefore must remand for explanation of the basis for denial." The trial court, on remand, held that the appeal was not timely filed.

Rule 4 of the Federal Rules of Appellate Procedure provides that thirty (30) days after the judgment or order is filed, the Notice of Appeal is required to be filed. In their Brief to the Appellate Court, Respondents purported to appeal the District Court's denial of the Motion for Reinstatement. That argument, however, focused on the trial court abusing its discretion in dismissing the case pursuant to Federal Rule of Civil Procedure 41(b).

The Sixth Circuit has treated motions like Respondents' Motion to Reinstate filed after dismissal in a case as a motion made either under Federal Rule of Civil Procedure 59(e) or as a motion made under Federal Rule of Civil Procedure 60(b). Civil Rule 59(e) provides for a Motion to amend or alter the judgment. Such a motion must be served not later than (10) days after the judgment entry or order. *See, Daniels v. Brennan*, 887 F.2d 783, 789 (7th Cir. 1989). Such a motion will toll the running of the appeal period if the motion is served within ten (10) days after the date of judgment. *See,* Civ. R. 4(a)(4) and Civ. R. 59(e).

In the case at bar, Respondents failed to serve their Motion to Reinstate Complaint within that ten (10) day period. Respondents did not serve their Motion to Reinstate Complaint until eighteen (18) days after the Order of Dismissal. Therefore, the Respondents failed to meet the time period prescribed by Civil Rule 4(a)(4) and Civil Rule 59(e), and thus, the Appellate Court could not have had jurisdiction.

The Sixth Circuit has also treated motions like Respondents' Motion to Reinstate as a motion made under Civil Rule 60(b). Courts treat motions like Respondents' Motion to Reinstate as a Civil Rule 60(B) Motion when the party serves its Motion to Reinstate the Complaint past the period prescribed for a Civil Rule 59(e) Motion. When the Appellate Courts choose to treat a motion to reinstate as a Civil Rule 60(B) Motion, the courts review the discretion of the trial court in determining whether or not the facts of the case were so exceptional as to warrant Civil Rule 60(b) relief.

The facts of this case are not so exceptional as to warrant granting Civil Rule 60(B) relief, a form of relief usually relied upon by Defendants. Before the case was ever dismissed by the District Court, Respondents were on notice that a pre-trial statement was required. Despite several opportunities to comply with the court's deadlines, the Respondents' failed to timely file a pre-trial statement.

Respondents certainly were dissatisfied with the District Court's dismissal pursuant to Civil Rule 41(b). However, they chose to wait eighteen (18) days after the Order of Dismissal to file their Motion to Reinstate Complaint. Respondents should have filed their notice of appeal from the original decision dismissing this action.

Respondents have offered no reason for their delay in filing their Motion to Reinstate Complaint or their Notice of Appeal. A Civil Rule 60(b) Motion cannot substitute for an appeal, and because exceptional circumstances do not exist in this case, Respondents' Motion to Reinstate Complaint cannot be treated as a Civil Rule 60(b) Motion. *Id.* (citing *Pierce v. U.M.W.*, 770 F.2d 449, 452 (6th Cir. 1985), *cert. denied*, 474 U.S. 1104 (1986)). Therefore, the Appellate Court should have precluded Respondents' appeal.

CONCLUSION

The District Court did not abuse its discretion in dismissing this action pursuant to Federal Rule of Civil Procedure 41(b) for failure to file a timely pretrial statement and overruling Respondent's Motion for Reinstatement. The authority of the District Court to dismiss *sua sponte* for lack of prosecution is an inherent power governed not by rule or statute but by the necessity of each Court to manage its own affairs to achieve orderly and expeditious disposition of cases. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). The clear record of delay and contumacious conduct displayed by Respondent's record in this case justifiably invoked the District Court's power to dismiss this case. Additionally, Respondent's should not be able to succeed on a Rule 60(B) Motion for Relief from Judgment when the appropriate action was to timely file an appeal. Therefore, the Court of Appeals incorrectly reversed the judgment of the District Court to dismiss the action with prejudice.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 5, 1992)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court.
This notice is to be *prominently* displayed if this decision is reproduced.

No. 91-3275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY ZONA and DEANNA ZONA,
Plaintiffs-Appellants,

v.

LINCOLN LOG HOMES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: JONES and NORRIS, *Circuit Judges;* and WOODS, *District Judge.**

* The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM. Plaintiffs, Stanley and Deanna Zona, appeal the district court's dismissal, for want of prosecution, of their breach of contract action. For the reasons that follow, we reverse and remand.

I

This case was the subject of a prior appeal. *Zona v. Lincoln Log Homes*, No. 90-3275 (6th Cir. Jan. 8, 1991). A more complete statement of the facts may be found therein. In its original posture, the district court, Judge Krenzler presiding, dismissed plaintiffs' action due to plaintiff's failure to file timely a pretrial statement. The district court is obligated to make conclusions of law to support a Rule 41(b) dismissal. *Bishop v. Cross*, 790 F.2d 38, 39 (6th Cir. 1986). Because the district court failed to fulfill its obligation, the prior panel of this court remanded for the district court to analyze plaintiffs' Supplemental Motion to Reinstate Complaint with Motion to File Pretrial Statement Instanter under the standards applicable to [2] Rule 59 or Rule 60 of the Federal Rules of Civil Procedure. *Zona*, No. 90-3275, slip op. at 5. The panel also expressed the opinion that, if the case were on appeal from the denial of a Rule 59 or 60 motion, the panel would not be satisfied that dismissal with prejudice was warranted; absent bad faith or contumacious conduct, some lesser penalty or sanction would be more appropriate. *Id.*

On remand, the district court reinstated its prior order dismissing plaintiffs' action with prejudice, noting that "[t]his court further finds that while the Plaintiffs' conduct was not in bad faith that [sic] it was contumacious conduct in that the Plaintiffs were in gross and utter disregard of the Standing Order of this court and of the various court orders." J.A. at 247. Plaintiffs now bring this appeal.

II

The Zonas contend that the district court abused its discretion in dismissing their action for failure to prosecute. As a threshold matter, we must determine whether that issue is preserved for our review.

The district court dismissed this case with prejudice for failure to prosecute on March 31, 1989. On April 17, 1989, the plaintiffs served a motion to reinstate the complaint. The ten-day period, which does not include weekends or holidays, for filing a Rule 59(e) motion expired on April 14, 1989. Accordingly, plaintiffs' motion is deemed a Rule 60(b) motion. An appeal from an order denying Rule 60(b) relief does not bring up for review the underlying judgment. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978). Accordingly, plaintiffs' appeal is limited to whether the district court erred in denying the Rule 60(b) motion.

Whenever legal error is relied upon for relief in a Rule 60(b) motion, the motion falls within the category of mistake under Rule 60(b)(1). *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). Motions predicated upon legal error must be filed within the normal time for taking an appeal. *Pierce v. United Mine Workers*, 770 F.2d 449, 451 (6th Cir. 1985), *cert. denied*, 474 U.S. 1104 [3] (1986). Plaintiffs' motion was filed within the prior period, and thus, we will consider their claim of legal error. The dismissal sanction should be used as a last resort after the court considers the feasibility of lesser sanctions. *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980); *cf. Taylor v. Medtronics, Inc.*, 861 F.2d 980, 985 (6th Cir. 1988) (addressing dismissal for failure to comply with discovery under Fed. R. Civ. P. 37); *Regional Refuse Sys.*

v. Inland Reclamation Co., 842 F.2d 150, 155 (6th Cir. 1988) (same). Indeed, absent a record of willfulness, bad faith, or contumacious conduct, a lesser sanction should normally be used. *See Vinci v. Consolidated Rail Corp.*, 927 F.2d 287, 287-88 (6th Cir. 1991); *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988); *Carter*, 636 F.2d at 161. Lack of prior notice that further dilatory or contumacious behavior may result in dismissal is pivotal to the question of willfulness and bad faith. *Harris*, 844 F.2d at 1256. Routine language in a standing order warning counsel of possible dismissal for missing a pretrial hearing is deemed insufficient prior notice. *Vinci*, 927 F.2d at 288. Insofar as the district court's factual findings conclude that the standing order provided the only notice, the court erred in dismissing plaintiffs' case. Moreover, we find that this situation presents the type of egregious error that warrants Rule 60(b) relief. Our policy in this area is clear; notice is an absolute precondition to *sua sponte* dismissal. *See Tingler v. Marshall*, 716 F.2d 1109, 1111-12 (6th Cir. 1983).

The district court purported to rely upon *Daniels v. Brennan*, 887 F.2d 783 (7th Cir. 1989) to support dismissal. Therein, the district court did dismiss a plaintiff's case for failure to file a pretrial statement; however, "[i]n her judgment of dismissal orally announced from the bench, Judge Conlon set forth specific conditions upon which Daniels could seek reinstatement. The conditions were that the case would be reinstated, 'if within the next two weeks the plaintiff produces the pretrial order and is ready for trial.' " *Id.* at 789 (quoting Judge Conlon's oral statement). Thus, the district court in *Daniels* provided a cure period following [4] dismissal. This procedure is certainly the functional equivalent of issuing an order stating that a plaintiff's

action will be dismissed on a certain, future date unless a certain action is taken. Accordingly, we have no quarrel with *Daniels*. The fact remains, however, that Judge Krenzler gave the Zonas neither notice nor a cure period. As expressed earlier, general, boilerplate notice is insufficient.

At oral argument on remand, the district court expressed its concern that our decision renders the court unable to enforce its elaborate standing order. It can, but not at the expense of a party's rights.

III

For the foregoing reasons, the district court's judgment is REVERSED, and the case is REMANDED to the Chief Judge of the Northern District of Ohio, whom we direct, in the exercise of this court's supervisory powers, to reassign to another judge. Said judge shall conduct further proceedings in a manner not inconsistent with this opinion.

ISSUED AS MANDATE:	June 29, 1992
COSTS:	None
FILING FEE	$
PRINTING	$
TOTAL	$

ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT

(Filed February 18, 1991)

Case No. C88-74

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STANLEY ZONA, *et al.*,
Plaintiffs,

vs.

LINCOLN LOG HOMES, INC.,
Defendant.

JUDGE ALVIN I. KRENZLER

ORDER OF DISMISSAL

This cause came on for hearing on the 7th day of February, 1991 pursuant to the decision of the United States Court of Appeals for the Sixth Circuit in Case No. 90-3275 remanding this case for further consideration by the District Court in light of the authorities cited and discussed, whether a penalty and/or sanctions should be mandated rather than the case dismissed with prejudice. The mandate from the Sixth Circuit Court of Appeals was issued in this case on or about January 30, 1991

This case was instituted on January 28, 1988 when the Plaintiffs filed a Complaint alleging breach of contract against the Defendant Lincoln Log Homes, Inc.

Defendant Lincoln Log Homes, Inc. filed its answer and an initial pretrial was scheduled on February 25, 1988. At the outset of this case, as in all cases, the Civil Case Standing Order Regarding Preparation For Trial was issued to counsel for Plaintiffs and Defendant. In pertinent part, this Standing Order states that it shall apply to all civil cases assigned to Judge Alvin Krenzler on or after the first day of August, 1987. Paragraph 1 page 1. Section II (G) provides "if counsel for any of the parties to the litigation does [2] not comply with all of the requirements of this Standing Order or refuses to cooperate with opposing counsel, he or she may be subject to sanctions. Sanctions may be sought by Motion of an opposing party or the court may impose sanctions by its own order." Section IV (L) provides "failure of counsel to appear at any scheduled pretrial or otherwise comply with any of the provisions of this standing order may result in dismissal, default judgment, or the imposition of sanctions, as may be appropriate." This court therefore finds that all parties were on notice from the outset of this case that various sanctions were possible for the violation of the Standing Order, including the possibility of dismissal. The Standing Order also provides counsel with the Pretrial Statement format so that counsel are thoroughly familiar with the nature of the Pretrial Statement from the outset of the case.

This court further finds that a discovery cutoff date was scheduled for April 29, 1988. Another post-discovery pretrial was set for May 3, 1988. On joint Motion of the parties, the court issued an order resetting the date for discovery set-off and set July 29, 1988 as the date for submission of Pretrial Statements.

On July 29, 1988, the date for submission of the Pretrial Statements, the parties again sought an extension time in order to file the Pretrial Statement. On August 1, 1988, Defendant filed its Pretrial Statement. Thereafter, the Motion to extend time to file Pretrial Statements was denied.

On January 26, 1989, over six months after the date the Pretrial Statements were due, the District Court ordered [3] Plaintiffs to submit the Pretrial Statement on or before February 28, 1989. Plaintiffs again failed to submit a Pretrial Statement. On March 30, 1989 the District Court dismissed this case with prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure.

On April 17, 1989, eighteen (18) days after the Order of Dismissal was filed, the Plaintiffs filed a Motion to Reinstate the Complaint. On May 5, 1989, the Plaintiffs filed a Supplemental Motion to Reinstate Complaint. The Plaintiffs did not appeal the Order of Dismissal filed on March 30, 1989.

On February 20, 1990 the District Court overruled Plaintiffs' Motions to Reinstate Complaint. Thereafter, on March 22, 1990 the Plaintiffs filed a Notice of Appeal.

The Federal Civil Rules do not contain provisions for a Motion to Reinstate Complaint. Thus, the Motion must be construed as either a Rule 59(e) Motion or a Rule 60(b) Motion. *Daniels v. Brennan*, 887 F. 2d 783 (7th Cir. 1989).

Rule 59 of the Federal Rules of Civil Procedure provides that such a Motion must be filed within ten (10) days of the entry of judgment. Here, the Plaintiffs filed their Motion eighteen (18) days after the Order of Dismissal. Therefore, the Motions fail and must be dismissed on those grounds.

Motions filed under Rule 60(b) cannot be used as a substitute for an appeal. In this case the Plaintiffs failed to appeal the Order of Dismissal and did not file an appeal until almost one year after the Order of Dismissal. Therefore, the Motion must also fail on the basis that the Plaintiffs had a remedy by way of [4] appeal rather than by way of a 60(b) Motion.

This court further finds that while the Plaintiffs' conduct was not in bad faith that it was contumacious conduct in that the Plaintiffs were in gross and utter disregard of the Standing Order of this court and of the various court orders. The Plaintiffs failed to file a pretrial statement on the first due date, July 29, 1988. This court gave the Plaintiffs an additional opportunity when on January 26, 1989 it ordered that a pretrial statement be filed no later than February 28, 1989. Even after the Plaintiffs ignored this order the court did not dismiss the Complaint until March 30, 1989. Such conduct does amount to contumacious conduct and justifies dismissal with prejudice. Furthermore, the court notes that the Plaintiffs were on Notice pursuant to the Standing Order that the failure to abide by the Standing Order and by court orders issued in the case could involve a sanction as severe as dismissal. The court further notes that even as of the date of the latest hearing, February 7, 1991, the Plaintiffs have still failed to file a pretrial statement.

Therefore, this case is hereby dismissed, with prejudice, for failure to prosecute, pursuant to Rule 41 of the Federal Rules of Civil Procedure and as a sanction upon Plaintiffs. Plaintiffs to pay costs.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

JOHN P. FOX, ESQ.
CHRISTOPHER FORTUNATO, ESQ.
PAUL W. LEITHART, II, ESQ.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 8, 1991)

NOT FOR PUBLICATION

No. 90-3275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY ZONA and DEANNA ZONA,
Plaintiffs-Appellants,

v.

LINCOLN LOG HOMES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: WELLFORD and NORRIS, *Circuit Judges*, and FORESTER, *District Judge.**

PER CURIAM. On January 28, 1988, Stanley and Deanna Zona, plaintiffs, filed a complaint alleging breach of contract against defendant Lincoln Log Home, Inc., (Lincoln). The district court scheduled an initial pretrial on February 25, 1988, and set a discovery cutoff date for April 29, 1988. Another post-discovery pretrial was set for May 3, 1988.

* THE HONORABLE KARL S. FORESTER, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

One day before the cutoff day for discovery, the parties jointly sought an extension of the discovery date, and the motion [2] was granted. Thereafter, the court issued an order resetting the date for discovery cutoff and setting the date for submission of the parties' pretrial statements. Pretrial statements were to be submitted on or before July 29, 1988, according to this subsequent court action. *Id.*

On July 29, 1988, the date for submission, the parties again sought an extention of time in order to file the pretrial statement based on "an extensive discovery process [that] is ongoing and will not be finished for another forty-five to sixty days." Despite the assertion by plaintiffs' counsel that the filing of a pretrial statement would be "impossible" until discovery was completed, the district court, by marginal notation, denied the motion. On September 22, 1988, plaintiffs made a motion to amend the complaint, which was denied.

On January 26, 1989, the district court instructed plaintiffs to submit the pretrial statement that had been due on July 29, 1988, approximately six months before. The statement not having been filed, the district court, on March 30, 1989, dismissed the case with prejudice pursuant to Fed. R. Civ. P. 41.

On April 17, 1989, the plaintiffs made a motion to reinstate the complaint, stating that the reason the pretrial statement was not filed was because of an "ensuing possibility of settlement at the time they were to be filed." The district court denied this motion and plaintiffs now appeal.

This is an appeal from denial of plaintiffs' 'supplemental motion to reinstate complaint with motion to file pretrial statement instanter." This motion was filed ten "working" days [3] after the court's order dismissing the case. Although not styled as a Fed. R. Civ. P. Rule 59 or 60 post-judgment motion for relief, it may be construed as such. If considered a Rule 59 motion for reconsideration or rehearing, it should be determined whether the motion was timely and set forth sufficient grounds for relief. If considered a Rule 60(b) motion, once again it needs to be considered as to timeliness and whether any ground under Rule 60(b) has sufficiently been demonstrated by plaintiffs as warranting relief. The district court indicated no basis for denial under these standards and we therefore must remand for explanation of the basis for denial.

If, on the other hand, this were deemed to be a timely appeal on the merits of the dismissal, we find it appropriate to discuss the principles applicable to a dismissal based on counsel's failure to conform in a timely fashion to a district court's procedural order.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1961), the Supreme Court held that courts have the inherent power "acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief."

Neither party on appeal cites to any Sixth Circuit cases discussing this issue. We have held that a dismissal with prejudice is a harsh remedy. *See Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980); *Holt v. Pitts*, 619 F.2d 558, 562 (6th Cir. 1980). We have reversed the dismissal of cases when the district court failed to put the derelict party on notice [4] that further

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noncompliance might result in dismissal. *See, e.g., Carter,* 636 F.2d at 159 (penalty of dismissal applies only in "extreme situations" of deliberate delay or "contumacious conduct"); *Bishop v. Cross,* 790 F.2d 38, 39 (6th Cir. 1986) (dismissal requires a "degree of willfulness, bad faith or contumacious conduct"); *Holt v. Pitts,* 619 F.2d at 562. *But compare Coston v. Detroit Edison Co.,* 789 F.2d 377, 379 (6th Cir. 1986) (repeated failure of counsel to appeal both at trial proceedings and on appeal without excuse justifies its dismissal).

We last discussed this issue in *Harris v. Callwood,* 844 F.2d 1254 (6th Cir. 1988). The *Harris* majority concluded: "In the absence of notice that dismissal is contemplated, a district court should impose a penalty short of dismissal unless the derelict party has engaged in 'bad faith or contumacious conduct.' " *Id.* at 1256.

Nowhere in the record does it clearly show that plaintiffs were put on notice that the district court was contemplating dismissal for their persistent failures. Accordingly, we must consider whether plaintiff "has engaged in 'bad faith or contumacious' conduct."

A *pro se* plaintiff who was not on notice that she was required to attend a pretrial conference was held not to have displayed bad faith or contumacious conduct when she failed to appear for the conference. *Id.* at 1256. We reversed the district court's dismissal of her action, but the plaintiff was not represented in that case.

[5] In *Bishop v. Cross,* 790 F.2d 38, 39 (6th Cir. 1986), we reversed dismissal of a civil rights claim, because the district court failed to articulate the legal basis for his absolute requirement that both plaintiffs be present throughout a voir dire. We noted, moreover, that the parties were not on notice that they were required to

attend the voir dire, and the alleged derelict party had complied completely with the discovery schedule and the court's pretrial order. *Id.*

In *Coston v. Detroit Edison Co.*, 789 F.2d 377, 379 (6th Cir. 1986), we affirmed a district court's dismissal concluding no abuse of discretion had occurred. In *Coston*, the derelict party's counsel failed to appear on several occasions under circumstances deemed unacceptable to the court. Most important, on appeal to this court plaintiff's counsel once again failed to appear. *Id.* at 378.

Plaintiffs here were not only late in filing a pretrial statement, but tendered this document only after dismissal. We are not satisfied, however, that the conduct in question was equivalent to "bad faith or contumacious conduct." Therefore, we REMAND for further consideration by the district court in light of the authorities cited and discussed,[1] whether a penalty and/or sanctions should be mandated rather than the case dismissed with prejudice.

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[1] We note for the record that the district court's mandated pretrial requirements are massive and perhaps more detailed than contemplated under the Federal Rules of Civil Procedure.

ORDER OF THE UNITED STATES DISTRICT COURT DENYING MOTION TO REINSTATE COMPLAINT

(Filed February 20, 1990)

Case No. C88-74

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STANLEY ZONA, *et al.*,
Plaintiffs,

vs.

LINCOLN LOG HOMES, INC.,
Defendant.

MOTION TO REINSTATE COMPLAINT

* * *

Motion is overruled.

/s/ JUDGE ALVIN I. KRENZLER
2-20-90

ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT

(Filed March 30, 1989)

Case No. C88-74

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STANLEY ZONA and DEANNA ZONA,
Plaintiffs,

vs.

LINCOLN LOG HOME, INC.,
Defendant.

JUDGE ALVIN I. KRENZLER

ORDER OF DISMISSAL

This Court issued its Standing Order in the above-captioned case. Pursuant to the Standing Order, the Attorneys' Pretrial Statement is to be submitted to this Court on or before the date specified in the Order of this Court. In the event that the parties cannot agree on any joint statement required by any section of the Attorneys' Pretrial Statement, each party is to submit a separate attachment to the Attorneys' Pretrial Statement setting forth the individual positions and the areas of disagreement. *See* Standing Order, section II-D.

In the case at bar, this Court ordered that an Attorneys' Pretrial Statement be submitted on or before July 29, 1988. No extensions of time were given. The defendant filed an individual pretrial statement on August 1, 1988. On January 26, 1989, this Court issued an order instructing the plaintiffs to submit a pretrial statement on or before February [2] 28, 1989. To date, plaintiffs have failed to submit an Attorneys' Pretrial Statement. Therefore, this case is hereby dismissed, with prejudice, for failure to prosecute, pursuant to Fed. R. Civ. P. 41, and as a sanction upon plaintiff. *See* Standing Order, sections II-G and IV-L. Plaintiff to pay costs.

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

JOHN P. FOX
PAUL W. LEITHART, II
LELAND D. COLE